

AUG 27 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FERNANDO ORDINOLA,

Defendant - Appellant.

No. 02-35867

D.C. No. CV-01-05015-JET
CR-97-05355-1-JET

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, Senior Judge, Presiding

Argued and Submitted August 6, 2003
Seattle, Washington

Before: BROWNING, ALARCON, and CLIFTON, Circuit Judges.

Fernando Ordinola has petitioned for relief under 28 U.S.C. § 2255, arguing that his trial counsel rendered ineffective assistance by failing to communicate properly and accept a plea offer. After holding an evidentiary hearing on the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

ineffective assistance issue, the district court denied Ordinola's petition. We affirm.

We review ineffective assistance of counsel claims de novo. *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002). Ordinola must show that counsel's actions were outside the wide range of professionally competent assistance and that he was prejudiced as a result of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687-690 (1984). *Strickland* applies to claims of ineffective assistance during the plea process. *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985).

Because conflicting evidence was presented below, resolution of Ordinola's claim depends upon a credibility determination. We review the district court's findings of fact for clear error. *Anderson v. Calderon*, 232 F.3d 1053, 1084 (9th Cir. 2000).

The district court found that (1) counsel fully advised Ordinola of the consequences of rejecting the plea and going to trial; (2) while there were only plea discussions and never a firm plea offer from the government, Ordinola did not want to accept what he understood to be a plea offer of 36 months; and (3) counsel recalled Ordinola unequivocally stating he wanted to go to trial. There is nothing in the record or in the briefs showing these factual findings to be clearly erroneous.

Based on this factual foundation, Ordinola cannot meet the first prong of the *Strickland* test.

AFFIRMED.